

# TOWN ATTORNEY CAN'T ALSO SERVE AS TOWN CLERK, HIGH COURT RULES

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### Body

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A month after ruling that a town's municipal prosecutor can't also be its public defender, the state Supreme Court on Tuesday dashed one lawyer's hope of serving as both town attorney and clerk.

The Court held that there was an unacceptably high potential for a conflict of interest when the town's chief administrator also was the person giving the town legal advice.

An attorney cannot reasonably be expected to give candid, objective advice concerning his own conduct as administrator, Justice Daniel O'Hern wrote for the 5-2 majority in **In the Matter of Advisory Committee on Professional Ethics No. 18-98**, A-62-98 [digested in this issue at page 86].

O'Hern wrote that there were many circumstances when the town administrator's decisions might have legal repercussions requiring counsel. For instance, an administrator's employment decision might lead to a discrimination claim,

contract decisions could lead to charges of preferential bidding and licensing decisions could lead to allegations of selective enforcement of ordinances.

But a strong dissent written by Justice Gary Stein and joined by Justice Marie Garibaldi took the position that any possible conflict was too remote and speculative to justify an absolute prohibition against the dual position.

Respectfully, I believe that the court's concerns are unrealistic and exaggerated, wrote Stein.

By banning the practice, the majority effectively nullified a state law that authorizes the same person to be appointed attorney and clerk, N.J.S.A. 40:81-11. The justices noted that they alone have the jurisdiction to determine whether a lawyer's conduct is ethical.

Gregory Hart, the municipal attorney of Old Tappan, first brought this issue to the attention of the Advisory Committee on Professional Ethics in 1998, when he was asked to take on the additional role of clerk/administrator. Hart, who had been town attorney for 10 years and also has his own law practice in Franklin Lakes, wanted to take the clerk position, but first sought an opinion from the ethics committee.

Just sort of as a protection for me and the borough, and as an afterthought, really, the mayor suggested I get an opinion from the committee on professional ethics, says Hart.

The committee ruled in September 1998 that Hart could not take the position because holding both jobs would create a conflict of interest and the appearance of impropriety. Hart then appealed to the Supreme Court.

Hart maintains the Court overestimated the potential for a conflict in this situation. In my 10 years as borough attorney, I can't think of one instance

when I was called upon to assess the behavior of the clerk, he says. He adds that in the practice of law, you always have the possibility of conflict, but that lawyers are able to assess whether there is a conflict requiring outside counsel on a case-by-case basis.

Deputy Attorney General Carol Johnston, who argued for the prohibition, says the ruling reflected the Court's determination that municipal attorneys should maintain independence, especially since the town attorney might have to deal with repeated fallout from the town clerk's actions.

The decision is about the line-drawing in the sense that it was about the potential for a conflict recurring, says Johnston.

However, Johnston acknowledges that the lines are often blurry when it comes to attorney ethics, noting the vigorous dissent in the case. The hard thing about ethics is that it's frequently a matter of how it hits you, she says.

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